PRETRIAL RELEASE AND DETENTION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 7747

AN ACT TO AMEND TITLE 23 OF THE DISTRICT OF COLUMBIA CODE WITH RESPECT TO THE RELEASE OR DETENTION PRIOR TO TRIAL OF PERSONS CHARGED WITH CERTAIN VIOLENT OR DANGEROUS CRIMES, AND FOR OTHER PURPOSES.

JANUARY 31 AND FEBRUARY 6, 1978

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CONTENTS

Alphabetical list of witnesses—Continued

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

66662

PREPARED STATEMENT OF J. PATRICK HICKEY, DIRECTOR, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

Mr. Chairman, I welcome the Committee's kind invitation to present my views on the proposed amendments to the pre-trial release provisions of the District of Columbia Code (H.R. 7747). I am speaking only for myself, and not on behalf of the Board of Trustees of the Public Defender Service.

It may be relevant to advise the Committee that my experience includes not only 15 years involvement in the defense of accused persons in the District of Columbia, but also responsibility for the litigation, referred to by earlier witnesses, which resulted in a declaration by the United States District Court that conditions at the District of Columbia Jail violated the constitutional rights of the persons being held there. The principal violation, and the one dealt with most vigorously by the Court, was the terrible overcrowding which dehumanized both inmates and jailers, and deprived the citizens held there of the most basic necessities. While that law suit dealt primarily with residents of the old Jail, and the new Jail provides substantially improved physical facilities, representatives of the Department of Corrections suggested in their testimony here last week that any significant increase in their population could lead to new violations of the District Court's Orders establishing minimal conditions of confinement for incarcerated persons. This prospect requires the Committee and the Congress to give the most careful scrutiny to any legislation which may significantly increase the

number of persons held in jail awaiting their trials.

History reflects an unfortunate tendency to incarcerate unnecessarily high numbers of persons in the pre-trial period. We have now learned that the great majority of all accused persons can be released without surety bonds and be relied upon both to appear as required for their trial and to avoid the commission of further offenses while released. This lesson, unfortunately, came only after years of routine pre-trial incarceration, at a terrible price in both human and financial terms, of persons whom judges assumed or believed presented unacceptable risks of flight. Given this danger of over-incarceration, I believe that the proponents of amendments which would increase the number of persons detained pre-trial should be required to make a strong showing both that there is a clear need for the recommended change and that the suggestions are reasonably limited to the perceived problem. I cannot agree that that burden has been met with regard to H. R. 7747.

The two major provisions I wish to address are those contained in Section 1 of H. R. 7747, authorizing judges to detain pre-trial persons charged with first degree murder, rape, or armed robbery even though they have no prior criminal record; and those in Section 3 of the bill adding persons on pre-trial release to those classes subject to the "Five-day hold" procedure.

With regard to the addition of first degree murder, rape, and

armed robbery as a basis for pre-trial detention, this seems to me a most dangerous departure from the long standing tradition that under our system of government persons are presumed innocent until they have been convicted. Historically, Courts and commentators have suggested that the authority to hold persons accused of capital offenses without bail stemmed from a fear that fugitivity was almost a certainty where the ultimate penalty was possible. However, whether this is so or not, a return to a denial of release for these charges seems totally unwarranted today in light of the data gathered about our criminal justice system by the Institute for Law and Social Research (INSLAW). That data makes clear that the nature of the charge against the defendant has no significant relationship either to the likelihood that he will flee or to the likelihood that he will be arrested on another offense.

When the concept of "preventive detention" was initially presented to the Congress during the early years of the Nixon Administration, a major claim of its supporters was that there need be no fear of needlessly incarcerating persons who were not in fact dangerous, since the statute required a demonstrated history of proven dangerous behavior before preventive detention was warranted. H. R. 7747, however, is prepared to translate the accusation of a criminal charge of first degree murder, rape or armed robbery into an assumption of guilt, since that is the only evidence required to determine that someone is dangerous and must

be detained pre-trial.

Of course, it bears repeating that if any persons accused of these crimes are already on probation or parole, adequate procedures exist for detaining them now. Many of them will also be subject to preventive detention under § 23-1322(a)(2), since these charges are "crimes of violence" for that purpose. Finally, if they are on bail for an earlier offense, the court under present law may revoke that bail and detain them or may sentence them to a term of imprisonment for contempt. This Committee has not been shown, nor can it be, any significant number of instances where inadequacies of the present law have resulted in the release of dangerous persons charged with these crimes who have committed additional offenses during the pre-trial period.

A basic flaw of the provisions of Section 3 of the bill to expand those groups subject to detention through the 5-day "hold" procedure is the same willingness to assume dangerousness from an arrest, and to needlessly multiply methods for detaining unconvicted persons when adequate remedies already exist. Since the debate on preventive detention began, its proponents and supporters have always argued that it was only a small number of highly dangerous recidivist offenders who required these drastic measures. However, the fact that almost all the persons identified in this category by the Career Criminal Unit of the United States Attorneys Office are presently being detained does not

seem to have dampened the interest of supporters of this legislation for authority to detain even more persons. In this regard the statistics presented by Mr. Silbert in his testimony before this Committee last week are particularly revealing.

The prosecutor's "Career Criminal Unit," created to focus attention on this small group of habitual criminals and described by Mr. Silbert as "an unqualified success," handled 430 defendants through December 31, 1977. Eight-two percent (82%) were on probation, parole or other post-conviction status and accordingly subject to detention under existing law pursuant to the 5-day hold procedure. Ninety-three percent (93%) of all career criminal defendants were detained pending trial. It thus appears that the existing laws both legally and in practice are more than adequate to deal with the vast majority of this small group of offenders.

In addition, another 16% of the career criminal defendants were on pre-trial release. As mentioned earlier, these defendants are subject to having their initial release revoked and to being detained, as well as being sentenced for contempt, pursuant to the already existing provisions of D. C. Code § 23-1329(a). Taking the two groups together (the post-conviction offenders and the persons already on pre-trial release), 98% of all the career criminal defendants fall in these two categories. Thus, based on the history of the career criminal program thus far, only 11 defendants were not already subject to either 5-day holds or revocation

of earlier pre-trial bonds, and undoubtedly some of those were nonetheless eligible for preventive detention because of their prior criminal records under the existing statute. These facts indicate conclusively that there is no need for additional legislation in this area, and the only likely result of the enactment of H.R. 7747 would be a large and unnecessary increase in the number of persons detained pre-trial, including persons who will not subsequently be convicted of the offense charged.

A few additional comments will complete my testimony. I have mentioned in testimony of forerunners of this legislation that I was unconvinced of the need to expand the 5-day hold to a 10-day period. As indicated above, almost none of the career criminals are obtaining release, so it does not appear that inability to comply with the time demands of the 5-day hold procedure has resulted in the release of many (if any) defendants. Mr. Silbert agrees that the 5-day hold has worked successfully "for the most part," and points, not to instances of defendants being released due to expiration of the five days, but only to "some instances" where revocation proceedings were not initiated within the 5 days. Of course, the judge in such an instance simply determines the appropriate bond to be set pursuant to D. C. Code § 23-1321, and he may consider, in assessing the likelihood of flight, the fact that a particular defendant is facing not only the penalty provided for the instant offense, but additional terms of imprisonment stemming from a possible

revocation of his parole or probation. In fact, in most of these instances, surety bonds are set and these defendants are not released. The picture of defendants on parole from distant jurisdictions, where 5 days is inadequate, is to me quite unconvincing in light of the government's statistics (statement of Mr. Silbert, page 4) showing that only 9 defendants were on State parole during the entire 16 months of the Career Criminal Program. I believe that it is well within the capacities of the system to effecutate a detention order within the 5 days if that is indicated.

Sinilarly, I see no justification for expanding the legitimated period of preventive detention from 60 days to 90 days for trial. I think it is essential to limit any incarceration of unconvicted persons to the bare minimum. Given the small number of cases in which preventive detention is sought by the government, it seems to me not unreasonable to require that they focus special attention and prosecutorial resources on those cases to insure that they will be brought to trial within the 60-day period.

Finally, it should also be noted that if the trial is not begun within sixty days, the defendant is <u>not</u> automatically released, but becomes eligible to have conditions of release (including a surety bond) set. I am unaware of any case in which a preventively detained defendant was released pre-trial at the expiration of the sixty day period. It was in this context that other witnesses drew analogies with time limits

26-371 O - 78 - 19

contained in federal speedy trial legislation. Of course, the District of Columbia has no speedy trial statute, and under current case law, a period of at least twelve months has generally been required to establish a prima facie claim of a denial of the right to a speedy trial.

I appreciate the opportunity to present my views to the Committee and hope I have been of some assistance.

END